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IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~750~~ 50

NOERR MOTOR FREIGHT, INC., et al.,
Respondents,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 758.

NOERR MOTOR FREIGHT, INC., ET AL.,
Respondents,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.
Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

1. Where the District Court found as a fact that petitioners combined and conspired with the specific intent of destroying respondent trucking companies as competitors in the long-haul freight business, in order to monopolize that business for themselves, and the Court of Appeals sustained that finding as soundly based on substantial evidence, are petitioners exonerated from liability under the Sherman Act because the means they employed to achieve their illegal objective included, among other activities, a public relations campaign against respondents (in which petitioners' role was concealed and disguised), to influence governmental action against respondents?

2. Was respondent association (PMTA) properly awarded damages, where petitioners raised no objection in the District Court to its standing to recover such damages, and the damages awarded were for the loss to the association itself caused directly by the conspiracy?

STATUTES INVOLVED

Respondents agree with Petitioners' citation of the statutes involved, but deny that any question arises under the First Amendment of the Constitution of the United States.

STATEMENT OF THE CASE.

The District Court found as facts,[1] which findings were affirmed as "soundly based on substantial evidence" by the Court of Appeals,[2] that:

"7. The acts of the various defendants referred to in these Findings of Fact and Conclusions of Law and of those persons employed or engaged by them, were done and performed pursuant to the conspiracy and with the intent and for the purposes and objectives referred to below in Findings of Fact Nos. 12 and 14,

. . .

"12. On or about May 19, 1949, defendants other than Byoir, acting through ERPC, combined and conspired with the intent and for the purpose and objective of eliminating truck operators, including plaintiff truck-

1. In a 74 page opinion. 155 F. Supp. 768 to 841, exhaustively analysing a trial record consisting of more than 6,000 pages and 968 exhibits. See 155 F. Supp. 808.

2. Under the practice of the third circuit the opinions of the court are circulated among all members of the court, including those not on the panel hearing the case. Rehearing is ordered when a majority of the court so votes. *United States v. United Steelworkers of America*, 271 F. 2d 676, 694 (3d Cir. 1959). It would appear from the Per Curiam opinion that a majority of the court did not favor rehearing here.

ing companies, from the long-haul transportation of freight in interstate commerce in the eastern territory and monopolizing that portion of interstate transportation and commerce for defendant railroads.

"14. Defendant Byoir joined the said combination and conspiracy with the intent and for the purpose and objective referred to in Finding of Fact No. 12, on or about August 15, 1949, when it was retained by ERPC as its public relations agency." (Appellants' Appendix in No. 12,750, pages 36a-37a, 181a. See also 106a-107a, 126a.)

See also the findings in Section III of the Final Decree filed July 22, 1958.[3]

The District Court also found that: "56. Plaintiff PMTA was injured by reason of the substantial expenditures which it made to defend itself and its members against defendants' conspiracy". (Appellants' Appendix in No. 12,750, page 46a, 181a.)

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3. Accompanied by a further opinion, 166 F. Supp. 163, 171-2. The Supreme Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271 (1949).

ARGUMENT.

Petitioners contend, in support of their request for certiorari, that the decision and injunction below are "remarkable" and "unprecedented", and that "this is not just another routine antitrust case" (Petition 4, 8, 9). Actually, there is nothing either remarkable or unprecedented about it. This type of antitrust case has become routine, as the citations below indicate. Petitioners' posture of surprise may be due in some part to their having overlooked the basic findings of fact as to the purpose of their conspiracy, which they ignore in the petition, as they did in the Court of Appeals.

In commenting on the injunction, petitioners again ignore the fact that the various subparagraphs of the injunction about which they complain apply, pursuant to Section IV (A), only to acts done in conspiracy and for the purpose of restraining competition. The dissemination of information is expressly not affected except where the connection of petitioners with the dissemination is concealed and they act in conspiracy for the purpose prohibited by the Sherman Act (Sec. IV (A) 65). Opposition to legislation, even where undertaken pursuant to the conspiracy, is expressly affected only where petitioners conceal their role in such opposition. Sec. IV (A) (9). The injunction provides that nothing contained therein is to be construed to prohibit petitioners from seeking legislative or other governmental benefits for themselves, nor from appearing before any governmental body to point out the effect upon them of the enactment of any legislative or administrative ruling which may be designed to aid respondents (Sec. V).

It has repeatedly been held that combinations in restraint of trade or to monopolize are not exempted from the scope of the antitrust laws merely because some or all of the means used by the conspirators involve contacts with legislative or other governmental agencies which would otherwise be privileged or even constitutionally protected

in the absence of the illegal purpose. *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927) (legislation); *Slick Airways, Inc. v. American Air Lines*, 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed 204 F. 2d 230 (3d Cir. 1953), cert. denied 346 U. S. 806 (1953) (courts and administrative board); *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), aff'd 355 U. S. 5 (1957) (courts); *Forgett v. Scharf*, 181 F. 2d 754 3d Cir. 1950) (courts); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 424-5 (10th Cir. 1952) (courts).

See also *Crummer v. DuPont*, 223 F. 2d 238, 248 (5th Cir. 1955) and 255 F. 2d 425 (5th Cir. 1958), cert. denied 358 U. S. 884 (1958);[4] *Atchison, Topeka & Santa Fe Rwy. v. Aircoach Transport Ass'n*, 253 F. 2d 877 (Ct. of App. D. C. 1958); *Riss & Co., Inc. v. Association of Western Rwys.*, 159 F. Supp. 288 (D. D. C. 1958); *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Parmelee Transportation Company v. Keeshin*, 144 F. Supp. 480, 484 (N. D. Ill. 1956).

And as said in *Parker v. Brown*, 317 U. S. 341, 351 (1943): "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," quoted in *Asheville Tobacco Board of Trade, Inc. v. F. T. C.*, 263 F. 2d 502, 508 (4th Cir. 1959). The same principle is illustrated in another context by *United States v. Silliman*, 167 F. 2d 607, 612 (3d Cir. 1948), cert. denied 335 U. S. 825 (1948).

Nor are such combinations exempt because the means which they employ consist of the dissemination of information. *Giboney v. Empire Storage & Ice Co.*, 335 U. S. 490 (1949). "The Sherman Act forbids combinations of traders to suppress competition," *United States v. Parke, Davis*

4. In its petition for certiorari, which was denied, the petitioner in the *Crummer* case made exactly the same arguments and cited substantially the same authorities as are advanced by petitioners here, including reference to Judge Clary's opinion in this very case. The parallel is so striking that the relevant section of the petition in that case is set forth in an Appendix hereto.

and Company, 28 U. S. L. Wk. 4150, 4154 (U. S. Feb. 29, 1960), and this is true regardless of whether the means would be legal or protected in the absence of the illegal purpose. *American Tobacco Company v. United States*, 328 U. S. 781, 809 (1946).

Furthermore, even if a propaganda barrage were otherwise exempt from the antitrust laws, such a privilege would be forfeited here where petitioners acted through front organizations, concealing their participation in these activities by what they euphemistically term "the third-party technique". Such concealment, particularly where employed to influence governmental action, has been held time and again to be illegal or against public policy. *Marshall v. The B. & O. R. R. Co.*, 16 Howard (57 U. S.) 314 (1853); *Angle v. Chicago, St. P. Minn. & O. Ry. Co.*, 151 U. S. 1 (1893); *Commissioner v. Textile Mills Sec. Corp.*, 117 F. 2d 62 (3d Cir. 1940), aff'd 314 U. S. 326 (1941); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 247 (1944); *United States v. Harriss*, 347 U. S. 612 (1954).

This situation is completely different from that presented to the Court in the recent cases of *Bates v. City of Little Rock*, 4 L. Ed. 2d 480 (1960) and *Talley v. California*, 28 U. S. L. Week 4186 (U. S. Mar. 7, 1960), where the NAACP and NATIONAL CONSUMERS MOBILIZATION were held to be protected by the Constitution in not revealing their members because of well-grounded fears of intimidation. Petitioners here, on the contrary, are among the most powerful corporations in the United States, who are in no danger of intimidation in the proper exercise of their constitutional rights if their identity is revealed. And in the *Bates* and *Talley* cases, the role of the NAACP itself and the other Negro organization was not concealed. Here the petitioners even concealed the fact that the railroad industry or railroad interest were disseminating the material, and affirmatively and artfully disguised the source by having it issued in the name of the Grange and other farm organiza-

tions, women's clubs, citizens' groups, college professors and governmental agencies. Public relations activities of this type are not exempt from the operation of the antitrust laws, and indeed the activities of the very defendant here, Byoir, were found to be an integral part of the A. & P. conspiracy in *United States v. New York Great A. & P. Tea Co.*, 173 F. 2d 79, 80, 90 (7th Cir. 1949).

Hence the usual rule is applicable that: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an intergral part of conduct in violation of a valid criminal statute. We reject the contention now." *Giboney v. Empire Storage & Ice Co.*, 335 U. S. 490, 498 (1949).

Petitioners, moreover, did not confine themselves simply to procuring legislation. They engaged also, pursuant to their conspiracy to monopolize the long-haul freight business, in a "third-party" campaign to alienate respondents' customers (Appellants' Appendix in No. 12,750, page 121a).

Finally, with regard to the standing of respondent association to recover damages, this issue was never even raised by petitioners in the District Court and is, therefore, waived. F. R. C. P. 12(h). Nor was it seriously pressed in the Court of Appeals. Respondents would be prejudiced if this contention were considered now, because they would not have entered into the stipulation which limited the individual respondents to nominal damages, if the defense had been claimed in the District Court. This issue, on the merits, was properly decided, because the Association was awarded judgment for damages accruing directly to it. See *American Cooperative Serum Association v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), cert. denied 329 U. S. 721 (1946).

CONCLUSION.

Petitioners have not challenged the District Court's fundamental findings of fact, and the Court of Appeals has held them to be soundly based on substantial evidence. Under those findings, petitioners cannot deny here that they combined and conspired for the unlawful purpose of eliminating respondent trucking companies as competitors in the long-distance hauling of freight, and that a violation of the Sherman Act has been established. The District Court's findings, affirmed by the Court of Appeals, similarly establish respondents' right to the relief granted.

For the reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX.

Excerpt From Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in DuPont v. The Crummer Company, in the Supreme Court of the United States, October Term, 1958, No. 366 (printed pages 13-15), Denied, 358 U. S. 884 (1958).

A substantial and increasing number of cases under the antitrust laws have raised in a variety of forms the question of the extent to which liability may be based upon the consequences of government action instigated or encouraged by the defendants against the plaintiffs before federal regulatory agencies or other government bodies. See, for example, *S. S. W., Inc. v. Air Transport Ass'n of America*, 191 F. 2d 658, 660 (D. C. Cir. 1951); *Okefenokee Rural Electric Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954); *Slick Airways v. American Airlines*, 107 F. Supp. 199, 213-214 (D. N. J. 1951), appeal dismissed 204 F. 2d 230 (3d Cir. 1953), cert. denied 346 U. S. 806; *United States v. Association of American Railroads*, 4 F. R. D. 510, 527 (D. Neb. 1945); *Noerr Motor Freight v. Eastern Railroad Pres. Conference*, 113 F. Supp. 737, 742 (E. D. Pa. 1953) and 155 F. Supp. 768 (E. D. Pa. 1957); *United States v. Morgan*, 118 F. Supp. 621, 822 (S. D. N. Y. 1953); *Riss & Co. v. Ass'n of Western Railways*, 159 F. Supp. 288, 289 (D. D. C. 1958); *Boston & Maine R. R. v. United States*, 162 F. Supp. 289, 300 (D. Mass. 1958).

These cases all make potential defendants of the members of any group which seeks government assistance for itself to the possible damage of others. The acts claimed in these cases to provide the basis for liability range from support of particular legislation to intervention before administrative agencies, and in some instances include the submission of information to law enforcement agencies with respect to possible violations of law. The decision below

raised the same fundamental questions presented by these cases and does so in an aggravated form because it imposes potential liability for an indefinite period of time upon the members of any group which directs the attention of a law enforcement agency to possible violations of law by others. If the decision is permitted to stand without review by this Court, its inevitable effect will be to discourage the submission of information to enforcement agencies, including necessarily even those—such as the Department of Justice and the Federal Trade Commission—which are themselves charged with enforcement of the antitrust laws.

The court below erred in holding that the act of supplying information to a government agency concerning possible violations of a federal statute can serve as a predicate for liability under the antitrust laws even if the act is assumed to have been performed pursuant to a conspiracy. The antitrust laws are directed at private combinations and conspiracies in restraint of trade and are designed to protect the public against the consequences that follow from these private activities. *Apex Hosiery Co. v. Leader*, 310 U. S. 469. The laws were not intended to regulate the relations between citizens and governmental agencies and cannot apply to consequences which are the result of governmental action. *Parker v. Brown*, 317 U. S. 341, 352; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; see also *Steele v. Bulova Watch Co.*, 344 U. S. 280, 288. To extend those laws, as the court below did, into the area of governmental activity would impose upon the relations between the government and its citizens standards which were intended for other purposes, and which are foreign and inimical to the rights of citizens to petition their government, to exercise free access to the courts, to appear before administrative agencies, and to submit information to law enforcement officials. The serious nature of the disruption of orderly government which can ensue from such an extension of the antitrust laws is evidenced in the present case.